Factual Background

This was a West Virginia product liability case alleging that a defective Sunbeam electrically heated throw (a small electric blanket) caused a fire, resulting in the death of an elderly woman, Lova Bryte, and personal injuries and property damage to the other petitioners. The case was dismissed on defendants' Rule 50 Motion for Judgement as a Matter of Law at trial, after the district court barred all opinions by plaintiffs' experts on the issues of the cause and origin of the fire, barred all expert testimony of known defects in this product that cause fires, and barred all other evidence, both lay and expert, related to other similar prior incidents involving this design of product.

The basis for barring the expert opinions on the cause and origin of the fire, as stated in the trial court record and in the opinion of the court of appeals, is that the plaintiffs' proffered expert witness on this issue, the West Virginia Deputy State Fire Marshal, Mack Dennis, who did the official state fire scene investigation, did not pass muster under Federal Rules of Evidence in the "*Daubert*" vetting of his opinion because he had not eliminated all other potential causes of the fire, other than the electric blanket. Also stated in the trial court record, but not addressed in the court of appeals opinion, was the district court's position that since Mr. Dennis did not take the remnants of the electric blanket from the fire scene and "do a scientific study on them" he could not proffer any opinions about it. The court having barred all expert opinions, the lack of evidence as to the cause and origin of the fire was, in the opinion of the district court, and the court of appeals, fatal to the petitioners' cause of action, and merited granting respondents' Rule 50 Motion for Judgement as a Matter of Law.

In the record of the district court, the expert opinions on the defects that are known to cause these products to catch fire, proffered by petitioners' expert electrical engineer, William-T. Cronenwett, Ph.D., were barred because he had not "examined" any remains of the product and the specific defect that caused this blanket to catch fire had not been identified. (None were salvaged from the fire scene to be available to examine or test.) The issue of Dr. Cronenwett not being permitted to testify as to the known fire causing defects was dismissed by the court of appeals as a moot issue, considering that petitioners had not produced sufficient evidence in support of the electric blanket being the cause and origin of the fire.

The district court in granting the respondents' Rule 50 Motion for Judgement as a Matter of Law, and the court of appeals affirming that ruling, did not address the issue of the sufficiency under West Virginia law of the testimony in the trial court record of Donna Miller, who discovered the fire and testified that the only thing burning when she entered the room was the electric blanket and Lova Bryte, and also testified that the candle that the defense implied may have been the cause of the fire was undisturbed, and out of reach of Mrs. Bryte.

Reasons Relied on for the Allowance of the Writ

(A) Petitioners contend that the district court, and the United States Court of Appeals for the Fourth Circuit, applied the Federal Rules of Evidence, as interpreted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), without regard to the substantive law of West Virginia. Here, the West Virginia "malfunction theory" of product liability provides the standard for the petitioners' burden of proof. Petitioners

contend that failure to consider the substantive state law is in violation of and in conflict with the requirements of *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), and other published opinions of this Court and various courts of appeals.

(B) Petitioners were entitled to, and did not receive, a *de novo* review by the court of appeals of the district court's determination of the substantive law of West Virginia, as stated in West Virginia's malfunction theory of product liability, in its review of the defendants' Rule 50 Motion for Judgment as a Matter of Law.

(C) The decision of the United States Court of Appeals for the Fourth Circuit sanctioned a departure by the district court from the accepted and usual course of judicial proceedings by, in this diversity case, the district court not applying the substantive West Virginia state law of product liability to the issues of the petitioners' burden of proof, in violation of *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), and the opinions of various courts of appeals.

(D) The decision and opinion of the United States Court of Appeals for the Fourth Circuit is in conflict with published opinions of this Court, and several courts of appeals, by its application of the Federal Rules of Evidence to bar the petitioners' expert from expressing any opinions as to the possible cause of the fire in issue. Under the existing body of federal case law this is a violation of petitioners' right to have their case heard and decided pursuant to the substantive law of their state, the West Virginia "malfunction theory" of product liability. West Virginia law permits a party to introduce evidence of the possible causes of the fire, and does

not require elimination of all other possible causes of the fire, in meeting their burden of proof.

(E) The decision and opinion of the United States Court of Appeals for the Fourth Circuit is in conflict with published opinions from this Court, and several courts of appeals, by its application of the Federal Rules of Evidence to bar all testimony of the petitioners' expert on the issue of the defects in these products known to cause fires. Under the existing body of federal case law this is a violation of petitioners' right to have their case heard and decided pursuant to the substantive law of their state, the West Virginia "malfunction theory" of product liability. West Virginia law permits a party to introduce evidence of the known defects in the product that could have caused it to catch fire in petitioners meeting their burden of proof on the issue of causation of a fire.

(F) The decision and opinion of the United States Court of Appeals for the Fourth Circuit is in conflict with published opinions of this Court, and several courts of appeals, by sanctioning the exclusion by the district court of all evidence of the petitioners' witnesses on the issue of other similar incidents of fire caused by the same design of the product. West Virginia law permits a party to introduce evidence of other similar incidents to meet their burden of proof. Under the existing body of federal case law this is a violation of petitioners' right to have their case heard and decided pursuant to the substantive law of their state, the West Virginia law of product liability.

(G) Material facts and legal principles were overlooked in the opinion of United States Court of Appeals for the Fourth Circuit such that the substantive law of West Virginia as stated in the West Virginia malfunction theory of product liability

concerning petitioners' burden of proof was not applied to the facts of this case. The decision and opinion of the United States Court of Appeals for the Fourth Circuit sanctioned granting the defendants' Motion for Judgment as a Matter of Law despite evidence in the record that adequately meets petitioners' burden of proof under West Virginia's substantive law of product liability. Under existing federal case law, this is a violation of petitioners' right to have their case heard and decided pursuant to the substantive law of their state, the West Virginia law of product liability.

ARGUMENT

A. The West Virginia "malfunction theory" of product liability is substantive state law.

The West Virginia "malfunction theory" of product liability allows plaintiffs to meet their burden of proof with circumstantial evidence in cases where the product at issue was destroyed by, or did not survive, the event it is alleged to have caused. The West Virginia malfunction theory of product liability permits plaintiffs to meet their burden of proof in a fire case by presenting evidence of the possible causes of the fire. *Skeen v. C & G Corp.*, 155 W. Va. 547, 558-59, 185 S.E. 2d 493, 501 (1971). See also, *Adkins v. K-Mart Corp.*, 204 W.Va. 215, 221, 511 S.E.2d 840, 846 (1998). The rule "does not impose upon the plaintiff a duty to exclude every other plausible theory as to the cause and effect of the accident." *Long v. City of Weirton*, 185 W.Va. 741, 762, 214 S.E. 2d 832, 848 (1975). "[P]laintiff's failure to exhaust every possibility concerning causation merely goes to the weight of the testimony. . . ." *Id.*

Under West Virginia's malfunction theory, "[I]t is not necessary to identify the specific defect that caused the

damage. . . ." *Anderson v. Chrysler Corp.*, 184 W.Va. 641, 645, 403 S.E. 2d 189, 193 (1991). Under West Virginia law, "[C]ircumstantial evidence may be sufficient to make a *prima facie* case in a strict liability action, even though the express nature of the defect cannot be identified." *Id.*, 184 W.Va. at 646, 403 S.E.2d at 194.

Under the substantive West Virginia law of product liability, a plaintiff is entitled to present expert evidence of their theory of causation in meeting their burden of proof at trial. *Ilosky v. Michelin Tire Corp.*, 172 W.Va. 435, 444, 307 S.E. 2d 603, 612 (1983). It is legally sufficient to present a jury issue under West Virginia product liability law when conflicting evidence supports plaintiff's theory of liability. *Id.* "[R]ecognition of the rule requiring proof of causation does not impose upon the plaintiff a duty to exclude every other plausible theory as to the cause and effect of the accident." *Id.* Other possible causes need not be ruled out. "The fact that other theories of causation may also be plausible does not prevent the jury from considering the appellee's theory." *Id.*

This malfunction theory is well established in the law, see, e.g., Restatement (Third) of Torts - Products Liability, § 3 (1998). When the product is lost or destroyed in the accident, direct evidence of a specific defect may not be available in which case this law of circumstantial evidence offers the plaintiff the only fair opportunity to recover. *Id.*, comment (b). This section allows an inference of either a design defect or a manufacturing defect without specifying the type of defect or the constituent part responsible for the product malfunction. *Id.*, comments (b) and (c).

B. In a diversity case, the federal court must conform to the substantive law of the state.

A party to a civil action tried in federal court as a diversity case is entitled to have the substantive law of their state applied to the case.

> In diversity cases, a federal court must conform to state law to the extent mandated by the principles set forth in the seminal case of *Erie R.R. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). Pursuant to *Erie* and its progeny, federal courts sitting in diversity apply state substantive law and federal procedural law. *Erie*, 304 U.S. at 78; *Wray v. Gregory*, 61 F.3d 1414, 1417 (9th Cir. 1995).
>
> Most evidentiary rules are procedural in nature, and the Federal Rules of Evidence "ordinarily govern in diversity cases." *Wray*, 61 F.3d at 1417. However, the Federal Rules do not supplant "*all* state law evidentiary provisions with federal ones." *Id.* (emphasis in original). Rather, state evidence rules that are "intimately bound up" with the state's substantive decision making must be given full effect by federal courts sitting in diversity. *Id.* (citing *Erie*). Moreover, some state law rules of evidence "in fact serve substantive state policies and are more properly rules of substantive law within the meaning of *Erie*." *Id.* (quoting 19 Wright, et al., Federal Practice and Procedure § 4512 (1984)).

Feldman v. Allstate Ins. Co., 322 F.3d 660, 666 (9th Cir. 2003). Here, the West Virginia malfunction theory of product liability, which provides the standard for a plaintiff's burden of proof, is such a substantive state law intimately bound up with the rights being asserted that must be given *Erie* consideration in a court's application of the rules of evidence at trial.

As the malfunction theory of product liability is well settled substantive law in West Virginia, the district court was bound to apply it at the trial of this case, but did not.

> A federal court sitting in diversity jurisdiction and called upon in that role to apply state law is absolutely bound by a current interpretation of that law formulated by the state's highest tribunal. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 464-65, 18 L. Ed. 2d 886, 87 S. Ct. 1776 (1967). So it is here.

Daigle v. Maine Medical Ctr., 14 F.3d 684, 689 (1st Cir. 1994). The district court was bound to permit petitioners' evidence of the possible causes of this fire, not require petitioners to exclude all other plausible causes of this fire, and permit evidence of the known defects in this product that could have caused this fire. All of this was proffered through plaintiffs' experts and lay witnesses.[1] Exclusion of this evidence is in violation of this body of federal case law.

C. The substantive law of West Virginia was required to be considered in the application of the Federal Rules of Evidence to petitioners' evidence on the burden of proof at trial.

In the published opinion of the Fourth Circuit of Appeals at issue here, perceived shortcomings of the plaintiffs' experts Mack Dennis and Dr. Cronenwett offering their opinions on the specific cause and origin of the fire, or the specific fire

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[1] The district court permitted petitioners to proffer, out of hearing of the jury, all of their intended testamentary and documentary evidence. (App. 53a-58a)

causing defect in this product, are discussed. However, the overriding substantive law of the state of West Virginia's malfunction theory, which does not require expert testimony on specific causation or specific defect, and does not require elimination of all other causes of this fire, is not addressed by the district court, and not addressed by the court of appeals in its review of the district court's handling of this case. Instead, the Fourth Circuit in effect concluded that this important tenet of substantive West Virginia's product liability law is nullified by the application of the Federal Rules of Evidence.

The court of appeals' opinion quotes a colloquy at trial between petitioners' counsel and the district court judge:

> Plaintiffs' attorney: "[T]he law in the Fourth Circuit and in West Virginia is that an expert need not review product remains to arrive at an opinion as to the probable defect in it."
>
> Court: "The evidence [law] is the Federal Rules of Evidence."

Bryte v. Am. Household, Inc., 429 F.3d 469, 475 (4th Cir. 2005). (App. 10a-11a) The court of appeals' opinion then states:

> As the transcript shows, plaintiffs essentially advocate applying West Virginia law rather than the Federal Rules of Evidence where, as here, product-liability claims, destruction of physical evidence, causation and expert testimony converged.
>
> The position of this district court was correct, and has been decided in *Cavallo v. Star Enterprises*, 100 F.3d 1150 (4th Cir. 1996).

Id. (App. 11a) The holding in *Cavallo* that the court is apparently referring to is:

> Unlike evidentiary rules concerning burdens of proof or presumptions, the admissibility of expert testimony in federal court sitting in the diversity jurisdiction is controlled by federal law. State law, whatever it may be, is irrelevant.

Cavallo v. Star Enter., 100 F.3d at 1157. This statement of the law by the Fourth Circuit Court of Appeals in *Bryte*, that the Federal Rules of Evidence take precedence "where, as here, product-liability claims, destruction of physical evidence, causation and expert testimony converged," is in direct conflict with the *Cavallo* opinion it cites, as well as the opinions of numerous other courts of appeals. The correct statement of law, deduced from the *Cavallo* quote above, is that "evidentiary rules concerning burdens of proof [i.e., state substantive law]. . . ." are controlled by state law.

The legal analysis that the district court overlooked, and that the court of appeals did not address in what should have been a *de novo* review of the applicable substantive West Virginia law, is that in meeting the burden of proof West Virginia's malfunction theory of product liability permits evidence of the possible causes of a fire, does not require elimination of all potential causes of a fire, permits evidence of known defects in the product that cause fires, and permits evidence of other similar incidents. All of this is permitted in support of a plaintiff's effort to meet his burden of proof under substantive West Virginia law. Any *Daubert* vetting of an expert's testimony must be done in the light of the legal analysis of what is a plaintiff's burden of proof in a West Virginia products liability case.

Despite petitioners proceeding under the West Virginia malfunction theory of product liability, the trial Judge, Honorable Richard L. Williams, Senior District Judge, visiting the Northern District of West Virginia from the Eastern District of Virginia, required rigid *Daubert* vetted expert testimony on the issues of the cause and origin of the fire and identification of the specific fire-causing defect in this product, without attempting any reconciliation with the substantive West Virginia state law on the issue of petitioners' burden of proof. As a part of his *Daubert* review, the district court required that the remains of the specific product involved in this fire had to have been "examined" to determine a specific defect before he would permit the expert to testify as to the known fire causing defects in this electric throw product. (App. 28a) The court also required direct evidence of the cause of the fire by a "scientific study" of the product remains away from the fire scene before he would permit the state fire marshal to opine that the electric throw was the probable cause of the fire. (App. 24a)

While inspection and testing may at times be an appropriate indicia of reliability for some expert testimony under the federal rules of evidence and *Daubert*, it is not mandatory. In some instances, it is impossible. In this case, no product remains survived to be inspected or tested. By requiring the impossible, the district court excluded all expert testimony from both the West Virginia Deputy State Fire Marshal, Mack Dennis, and petitioners' electrical engineering expert, William T. Cronenwett, Ph.D., and doomed the petitioners' case, without considering the substantive law of West Virginia on the petitioners' burden of proof in such circumstances. Although this is the reason stated in the trial court record for barring the opinions at trial of the petitioners' experts, the court of appeals does not address this

determination of West Virginia substantive law in exercising its duty of *de novo* review.

The district court was bound by West Virginia law on the issue of a plaintiffs' burden of proof. This law permits petitioners' evidence on the possible causes of this fire. It does not require petitioners to exclude all other plausible causes of this fire. West Virginia law permits evidence of the known defects in this design of product that could have caused this fire, and permits evidence of other similar incidents, in meeting the burden of proof. All of this was proffered through petitioners' experts. Exclusion of this evidence is in violation of this body of federal case law.

D. The opinion of the court of appeals is in violation of the doctrine of *Erie v. Tompkins*, and is in conflict with other opinions of the Fourth Circuit, and numerous other courts of appeals.

The law as stated by the Fourth Circuit Court of Appeals in the *Bryte* opinion is that the Federal Rules of Evidence are supreme over the substantive law of the states. This is in direct conflict with the longstanding holding of this Court that in diversity cases the substantive law of the state applies.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their

> nature or "general," be they commercial law or a part of the law of torts.

Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188, 1194 (1938).

The *Bryte* holding further is in conflict with this Court's opinion in *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 535, 2 L. Ed. 2d 953, 961, 78 S. Ct. 893, 899 (1958), which holds that where a state's procedural rule is bound up with substantive policy, a federal court is to apply the state rule. In spite of these holdings by this Court, the *Bryte* holding has in effect used a procedural federal court rule to nullify the substantive product liability law of West Virginia.

The holding by the Fourth Circuit in this case, that the Federal Rules of Evidence take precedence "where, as here, product-liability claims, destruction of physical evidence, causation and expert testimony converged," *(Bryte*, F.3d at 475)(App. 11a), is also in direct conflict with the *Cavallo* opinion it cites for support. The language from *Cavallo*, that the court of appeals is apparently referring to for support is:

> Unlike evidentiary rules concerning burdens of proof or presumptions, the admissibility of expert testimony in federal court sitting in the diversity jurisdiction is controlled by federal law. State law, whatever it may be, is irrelevant. [emphasis added]

Cavallo, F.3d at 1157. The rule of law, as deduced from the *Cavallo* quote above, is that "evidentiary rules concerning burdens of proof . . ." [i.e., state substantive law] are controlled by state law. Here, the West Virginia substantive product liability law provides the standard for petitioners' burden of proof, but it was not applied.

Finally, the holding in *Bryte* is in conflict with published opinions of several courts of appeals reconciling the Federal Rules of Evidence with state product liability law. These cases generally hold that where there are circumstances in which a question of admissibility of evidence is intertwined with a state's substantive rule, the state rule will be followed in order to give full effect to the state's substantive policy, *e.g., Forrestal v. Magendantz*, 848 F.2d 303, 307 (1st Cir. 1988). (Federal courts and congress are constitutionally precluded from displacing state substantive law with federal substantive rules in diversity actions.); *DiAntonio v. Northampton-Accomack Memorial Hosp.*, 628 F.2d 287, 291(4th Cir. 1980) (Virginia Malpractice Act provision allowing opinion of arbitration panel to be admitted at subsequent trial controls.); *Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 104 (4th Cir. 1995) (Federal court is to apply state substantive law and federal procedural law in diversity cases. However, where a state's procedural rule is bound up with substantive policy, a federal court is to apply the state rule.); *Conway v. Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837, 839 (5th Cir.-OLD 1976) (Burden of proof is an issue of substance, controlled in diversity cases by state law.); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1168 (5th Cir.-OLD 1979) (As a general rule, in a federal diversity case the district court applies the substantive law of the forum state.); *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 920 (10th Cir.), *cert. denied*, 469 U.S. 853, 83 L. Ed. 2d 110, 105 S. Ct. 176 (1984) (In a diversity of citizenship case the federal district court sits as a state trial court and applies the law of the forum state.); *Rexrode v. American Laundry Press Co.*, 674 F.2d 826, 831 (10th Cir. 1982), *cert. denied*, 459 U.S. 862, 103 S. Ct. 137, 74 L. Ed. 2d 117 (1982) (State evidentiary law will be applied to determine admissibility of industry standards in diversity strict liability cases.); and *Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 869

(10th Cir. 1993) (A federal court, sitting in diversity, must ascertain and apply state law with the objective that the result obtained in the federal court should be the result that would be reached in a state court.).

These cases cited above all stand for the proposition that:

> The constitutional meaning of the *Erie* doctrine seems to be this: The enumerated powers set forth for the Congress in Article II and for the Judiciary in Article III are by implication limited powers, and the notion of limited federal authority is reinforced by the Tenth Amendment. Therefore, the federal judiciary may not "find" or "create" general law to resolve controversies merely because they are litigated in federal court. . . . It is unlikely that the Congress intended, in enacting [Federal Rule of Evidence] Rule 407 along with the other rules, to make any incursion whatsoever in the *Erie* doctrine. [citations omitted]

Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d at 932-933. [emphasis added] Here, the district court, and the Fourth Circuit Court of Appeals, have bypassed the analysis of what the substantive law of West Virginia permits for plaintiffs to meet their burden of proof, and without giving consideration to that substantive law, employed the Federal Rules of Evidence, and Federal case law (i.e., *Daubert*), to nullify a long established substantive West Virginia state rule of law that was intended to preserve the right of West Virginia citizens to recover damages when injured by a product with a history of defects, and where the product is destroyed by the manifestation of its defect such that it can not be meaningfully examined or tested.

By holding petitioners to standards that give no consideration to the substantive law of West Virginia that would have applied in state court, requiring product remains inspection and "testing" in vetting the admissibility of their experts' testimony, with no consideration to the West Virginia substantive law on the evidence permissible in meeting the burden of proof, the district court, and now the Fourth Circuit, has nullified the substantive West Virginia malfunction theory of product liability. This is the precise type of case to which the West Virginia malfunction theory of product liability law was meant to apply, where none of the product survived to be inspected and tested.

This holding by the Fourth Circuit is also in conflict with its own previous opinion on this issues expressed in *Hottle v. Beech Aircraft Corp.*, 47 F.3d 106 (4th Cir. 1995).

> In *Erie R.R. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), the Supreme Court held that because Congress had no power to declare substantive rules of common law applicable in a state, federal courts sitting in diversity must apply state substantive law, decisional as well as statutory, in the adjudication of state-created rights. Thus, began the general rule that a federal court is to apply state substantive law and federal procedural law in diversity cases. See *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 154 (4th Cir. 1978). However, the Supreme Court has also noted that where a state's procedural rule is bound up with substantive policy, a federal court is to apply the state rule. *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 535, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958).

Id. at 109. The *Hottle* opinion went on to say:

> The Court explained that "Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules differ from comparable state rules." *[Hanna v. Plumer*, 380 U.S. 460, 473, 85 S.Ct. 1136, 1145, 14 L. Ed. 2d 8, 18 (1965)] Accordingly, we, along with other courts of appeals, have held that the Federal Rules of Evidence, as validly enacted procedural rules, govern in diversity cases. See *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1054 (4th Cir. 1986). However, there is no uniformity among the circuits as to whether the federal rules control when a state evidentiary rule either embodies or is closely tied to a state substantive policy. See *Stonehocker*, 587 F.2d at 154-55; see also 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 2405, at 326-7 (1971 & Supp. 1994). In such a situation, application of the federal rule of evidence, although beyond argument procedural, may encroach upon a State's substantive law. This Circuit, along with the First, Third, Fifth, Seventh, Eighth, and Tenth have held that although the Federal Rules of Evidence typically govern in diversity cases, "there are circumstances in which a question of admissibility of evidence is so intertwined with a state substantive rule that the state rule . . . will be followed in order to give full effect to the state's substantive policy." [Citations omitted]

Id. at 109-110.

The West Virginia state substantive policy, as stated in its law of the malfunction theory of product liability, is that evidence of the known defects and defect history of the product is admissible evidence in support of proof of liability;

all potential causes of a fire need not be eliminated; and experts may offer their opinions as to the possible failure modes and fire causes. The Federal Rules of Evidence, via *Daubert*, may not be used to bar substantive evidence that otherwise would be admissible in a West Virginia state court product liability trial proceeding on the West Virginia malfunction theory.

> Under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), "federal courts and Congress are constitutionally precluded from displacing state substantive law with federal substantive rules in diversity actions." *[citations omitted]*

Forrestal v. Magendantz, 848 F.2d 303, 307 (1st Cir. 1988). Had this case been tried under West Virginia's substantive law, as it should have been, this evidence would have been admitted.

E. Entitlement to *de novo* review.

As this Court has consistently held, a court of appeals should review *de novo* a district court's determination of state substantive law.

> We conclude that a court of appeals should review de novo a district court's determination of state law. As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts. See 28 U. S. C. § 1291. The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations.

Salve Regina College v. Russell, 499 U.S. 225, 231; 111 S.Ct. 1217, 1221; 113 L.Ed. 2d 190, 198 (1991). Furthermore, as this Court has previously noted, there are good reasons why a party is entitled to meaningful appellate review of that decision of law, just as he is of any other legal question in the case, and just as he would have been if the case had been tried in a state court:

> As a general proposition, a federal court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions as to the law of that state than is a federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts frequently have voiced reluctance to substitute their own view of the state law for that of the district judge. As a matter of judicial administration, this seems defensible. But there is some tendency to go beyond that proposition and to say that if the trial court has reached a permissible conclusion under state law, the appellate court cannot reverse even if it thinks the state law to be otherwise, thereby treating the question of state law much as if it were a question of fact. The determination of state law, however, is a legal question, and although the considered decision of a district judge experienced in the law of a state naturally commands the respect of an appellate court, a party is entitled to meaningful review of that decision just as he is of any other legal question in the case, and just as he would have been if the case had been tried in a state court. [emphasis added]

Id., Footnote 5, 499 U.S. at 239, 111 S. Ct. at 1225, 113 L. Ed. 2d at 203. While "the considered decision of a district

judge experienced in the law of a state naturally commands the respect of an appellate court," with all due respect, the trial judge here, the Honorable. Richard L. Williams (Senior District Judge), while an experienced and respected jurist in the state of Virginia, was sitting by appointment on this WEST VIRGINIA civil action. Judge Williams, as a visiting judge from Virginia, did not have the advantage (nor did the petitioners have the benefit) of jurist with a "personal acquaintance with the law of the state." West Virginia's substantive product liability law is materially different in this regard from the law of Virginia.[2]

Considering that fact, it was all the more important that there have been an independent review of the legal issues on which the outcome of this case hinged, particularly those issues that dealt with the substantive West Virginia law of

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[2] An example of the visiting trial judge's misapprehension of West Virginia law, and his related predisposition in this case, is found in some of his statements to the jury panel during *voir dire*. In pretrial motions, ruled on by a West Virginia based federal magistrate judge, the court had found the petitioners had not spoliated any of the evidence in this case. In spite of that finding, the visiting trial judge informed the jury panel:

> Mr. David Bryte threw away at the local trash heap after four or five days all of the debris remaining from the fire. Now, under our system of justice where a manufacturer of a product is sued by someone claiming that it was defective, they are entitled to have that product delivered to them for inspection to see whether it is defective or not. (App. 49a)

That is not the law of West Virginia under the malfunction theory of product liability where the product has been destroyed by the event it created.

product liability and the petitioners' burden of proof at trial. As this Court has held:

> Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs. Thus, trial judges often must resolve complicated legal questions without benefit of "extended reflection [or] extensive information." [citation omitted]

Id., 499 U.S. at 231-232, 111 S. Ct. at 1221, 113 L. Ed. 2d at 198. Certainly, the nuances of West Virginia's substantive malfunction theory of product liability was such a complicated legal question.

> Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review.

Id. Unfortunately for petitioners, there was no such consideration given by the Fourth Circuit Court of Appeals to the legal issue of the district court's application of the West Virginia malfunction theory of product liability in this case, nor the application of that substantive law to the facts in the record, in its review *de novo* of the district court's determination of West Virginia's state law applicable to the

respondents' Rule 50 Motion for Judgment as a Matter of Law.

It is not legally sufficient for the court of appeals to have given no consideration to the substantive West Virginia malfunction theory of product liability, the petitioners' burden of proof as stated therein, and how that law was or was not properly interpreted and applied by the district court in excluding all of the testimony of petitioners' experts. It is also not legally sufficient for the court of appeals to have given no consideration to the substantive West Virginia malfunction theory of product liability, the petitioners' burden of proof as stated therein, and how that law was or was not determined and applied by the district court to the lay testimony that was admitted into evidence. It is not sufficient now to assume that the court of appeals merely gave deference to the district court's determination and application of state law in this regard.

> [T]he difference between a rule of deference and the duty to exercise independent review is "much more than a mere matter of degree." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984). When de novo review is compelled, no form of appellate deference is acceptable.

Id., 499 U.S. at 238 111 S. Ct. at 1224, 113 L. Ed. 2d at 202. The degree of deference here was to the degree that the substantive West Virginia law is not even addressed in the published opinion of the court of appeals.

Instead of discussing and applying West Virginia law, the court of appeals discussed Maryland state law on the issue of circumstantial evidence and the necessity to eliminate other potential causes of the fire. "Under [*Riley v. De'Longhi*

Corp., 2000 U.S. App. LEXIS 27082 (4th Cir. 2000), unpublished appeal from the United States District Court for the District of Maryland] the rule in Maryland in deciding whether there is sufficient circumstantial evidence of a product defect to proceed to trial, is that the court considers five factors. . . ." *Bryte*, 429 F.3d at 479. (App. 17a) The court of appeals incorrectly assumed the law of West Virginia was the same as the law of Maryland on this issue.[3] The court incorrectly determined that West Virginia law required the elimination of other causes of the fire. "In this case the elimination of other causes of the accident has not been shown, as we have related above, so there has been no showing of the elimination of other causes of the accident." *Id.* (App. 18a) As discussed above, this is not the law in West Virginia. "Causation is a question of fact. . . . '[R]ecognition of the rule requiring proof of causation does not impose upon the plaintiff a duty to exclude every other plausible theory as to the cause and effect of the accident.' [citation omitted]" *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d at 612 [emphasis added].

The court of appeals used law from the District of Columbia District Court, not West Virginia law, in support of its position that scientific evidence of causation was necessary.

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[3] Petitioners had cited *Riley v. De'Longhi Corp.*, 2000 U.S. App. LEXIS 27082 (4th Cir. 2000) as an illustration of the analytic process to be applied in determining the sufficiency of circumstantial evidence, but not for the proposition that the Maryland law on a plaintiff's burden of proof was the same as West Virginia law. For example, unlike Maryland, West Virginia does not require the elimination of other causes of the fire as a prerequisite to admitting evidence in support of a plaintiff's theory of causation.

> With no witness as to ignition, there simply was no evidence of causation other than Dennis', and via that, Dr. Cronenwett's, testimony. As in [*Ealy v. Richardson-Merrell, Inc.*, 283 U.S. App. D.C. 137, 897 F.2d 1159 (D.C. Cir. 1990)], "the only evidence [plaintiffs] have on the issue of scientific causation is the testimony of their experts. Once that testimony is deemed inadmissible, it is self-evident that the evidence is insufficient to support a verdict for the plaintiffs." 897 F.2d at 1163 (emphasis added). We are of that same opinion here and so hold.

Bryte, 429 F. 3d at 480. (App. 19a-20a) Once again, scientific evidence of causation is not required under the West Virginia malfunction theory of product liability. The West Virginia malfunction theory of product liability permits plaintiffs to meet their burden of proof in a fire case by evidence of the possible causes of the fire. *Skeen v. C & G Corp.*, 155 W. Va. 547, 558-59, 185 S.E. 2d 493, 501 (1971). See also, *Adkins v. K-Mart Corp.*, 204 W.Va. 215, 221, 511 S.E.2d 840, 846 (1998). The rule "does not impose upon the plaintiff a duty to exclude every other plausible theory as to the cause and effect of the accident." *Long v. City of Weirton*, 185 W.Va. 741, 762, 214 S.E. 2d 832, 848 (1975). "[P]laintiff's failure to exhaust every possibility concerning causation merely goes to the weight of the testimony. . . ." *Id.* The court of appeals did not consider the substantive West Virginia law in its *de novo* review.

F. The substantive law of West Virginia was not applied to petitioners' lay witness testimony in *de novo* review.

In review of a Motion for Judgment as a Matter of Law, the court of appeals must view the evidence in the record in a

light most favorable to the non-moving party, the petitioners here, and that review must be *de novo*. *Brown v. CSX Transp.*, 18 F.3d 245, 248 (4th Cir. 1994). Applying the standards for the petitioners' burden of proof, as stated in the West Virginia malfunction theory of product liability, and viewing the lay testimony of Donna Miller admitted into evidence at trial in a light most favorable to the petitioners, leads to the conclusion that the jury may have found that the Sunbeam electric blanket was the cause of this fire.

However, in its opinion, the court of appeals states:

> We also note that, at the beginning of the trial, the **justifiable impression of the district court**, the depositions of most of the witnesses having been taken, when Mrs. Miller left to get the child, "there was a candle lighted on a table within reach of the decedent." [emphasis added]

Bryte, 429 F.3d at 477. (App. 15a) The quote "there was a candle lighted on a table within reach of the decedent," is not from testimony in the trial record, but is a statement made by the district court judge to the jury panel during *voir dire*. (App. 50a) The district court's **impression**, on something that is not in the record of the trial, is not a proper basis on which to base a Rule 50 Judgment as a Matter of Law. There is no citation to the record by the court of appeals on this issue most likely because the district court's "impression" is not supported by the evidence in the trial record. The evidence, which is what a Rule 50 motion is to be based on, is to the contrary.

Donna Miller's eyewitness account of her discovery of the fire, admitted into evidence, was that the candle on the end table was undisturbed and out of the reach of Mrs. Bryte.

(App. 40a, 43a-44a) Her testimony in the record at trial was that the electric blanket was the only thing burning when she entered the room. (App. 38a-42a) Mrs. Miller was unable to put the fire out and eventually was forced to flee.

The evidence in the trial record is that only the blanket was on fire. There was no evidence in the trial record that anything else was on fire. Even if there were such evidence, in review of the Rule 50 Motion for Judgment as a Matter of Law, the inferences must be drawn in favor of the petitioners that these other things in the room did not cause the fire. There certainly was no evidence in the record that any thing other than the electric blanket did cause the fire.

The court of appeals, however, supported its affirming the Rule 50 dismissal of the petitioners' case by stating that scientific proof of the cause of the fire was necessary and absent, as a result of the exclusion of petitioners' experts. Erroneously assuming that the law of the D.C. Circuit on the issue of the burden of proof was the same as the law of West Virginia, the court of appeals adopted the language of *Ealy v. Richardson-Merrell, Inc.*, 897 F.2d at 1163, "'Unfortunately for [plaintiffs], the only evidence they have on the issue of scientific causation is the testimony of their experts.'" [Emphasis added] *Bryte*, 429 F.3d at 476. (App. 12a) Aside from the argument that the exclusion of all opinions of the petitioners' experts on this issue was improper under West Virginia law, the fundamental premise that West Virginia law required scientific proof of the cause of the fire was also incorrect. That is not the law of West Virginia, as discussed above.

Finally, the discussion and speculation by the court of appeals in its published opinion as to other possible causes of the fire *(Bryte*, 429 F.3d at 477-78)(App. 14a-16a)

presumably obtained from the pre-trial *Daubert* motion briefings, has no place in the legal analysis of the adequacy of the evidence admitted at trial to support a Rule 50 Motion for Judgment as a Matter of Law, and to have given it any consideration was a misapplication of the law for a *de novo* review of a Rule 50 Judgment as a Matter of Law.

CONCLUSION

Contrary to the purpose of the West Virginia malfunction theory, the district court, and now affirmed by the court of appeals, improperly excluded all of the petitioners' evidence concerning the possible causes of the fire, and the known fire causing defects in this product. The district court also improperly excluded evidence of other similar incidents, both from victims of similar Sunbeam electric blanket fires, and from an expert who had examined similar products which had been returned to the manufacturer with fire damage. All of this evidence is admissible in meeting the burden of proof in a West Virginia products liability case proceeding on the malfunction theory of product liability. The court incorrectly determined that the substantive law of West Virginia required scientific proof of the cause of ignition.

On appeal, petitioners were to receive a *de novo* review of the district court's determination and application of state law. No such *de novo* determination of West Virginia substantive law is in the opinion because the court of appeals incorrectly determined that the Federal Rules of Evidence take precedence over substantive state law, no matter what that state law may be. The opinion of the court of appeals has misapprehended the substantive West Virginia malfunction theory of product liability, engages in no analytical discussion of that law, and does not address how that law may be reconciled with the

rulings of the district court, other than to dismiss it as being superceded by the Federal Rules of Evidence.

Applying the West Virginia malfunction theory to the evidence at trial in the light most favorable to the petitioners, as required, leads to the conclusion that the electric throw was at least one of the possible causes of the fire (all that is required to create a jury question under the West Virginia malfunction theory) if not in fact the only cause of the fire. That in turn leads to the admission of the petitioners' expert evidence of the known defects in these products that cause them to spontaneously catch fire, as well as the admission of both lay victim and expert evidence of incidents of other similar products having spontaneously caught fire.

For the foregoing reasons, petitioners pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 04-1051

[Filed November 21, 2005]

DAVID BRYTE, Personal Representative of the Estate of Lova E. Bryte, deceased; DAVID BRYTE; KATHY B. SMITH; JAMES B. SMITH; M.E. SMITH, a minor, by and through her legal guardian, Kathy B. Smith; DONNA J. MILLER,
Plaintiffs-Appellants,

v.

AMERICAN HOUSEHOLD, INCORPORATED, formerly known as Sunbeam Corporation; SUNBEAM PRODUCTS, INCORPORATED,
Defendants-Appellees,

and

SEARS ROEBUCK AND COMPANY,
Defendant.

OPINION

WIDENER, Circuit Judge:

On October 23, 2000, Lova Bryte died in a fire in her Preston County, West Virginia apartment. She was using an electrically heated throw at the time of the fire. Several weeks later, plaintiffs, Mrs. Bryte's personal representative and relatives, brought this action against defendant American Household, Inc. (formerly Sunbeam Corp.), the manufacturer of the throw. Plaintiffs alleged that the electric throw had a defective safety circuit and that this defect caused the deadly fire. At trial, the district court excluded various evidence, including expert testimony, offered by plaintiffs to prove the causation and defect elements of their claims. At the close of plaintiffs' case, the district court granted defendant's motion for judgment as a matter of law on the ground that plaintiffs had not established sufficient evidence of causation. Plaintiffs appeal from the district court's evidentiary rulings and the ensuing judgment for defendant. We affirm.

I.

Though the record on appeal is extensive, the basic facts of this case are not disputed. Mrs. Bryte had begun using the electric throw in question about two years before the fire occurred, after having suffered a stroke. As a result of her stroke, Mrs. Bryte could not pick herself up from her recliner without assistance, and her movement was limited to shifting in the chair. Also as a result of her stroke, Mrs. Bryte used the electric throw throughout the year to keep warm when sitting in her recliner. Typically, she would have had placed over her a blanket or afghan and the throw would be laid on top of the blanket. When in use, the electric throw would be plugged directly in to a wall outlet on Mrs. Bryte's left.

When not in use, the throw was draped over the back of the recliner or a love-seat. The throw had not malfunctioned and there was no visible damage to it or its power cord.

Other than the recliner, the living room of Mrs. Bryte's apartment contained a love-seat, a television and VCR, a coffee table, a telephone, and a small table to the right of the recliner, which table had a lamp and a candle on it. Mrs. Bryte did not smoke.

The morning of the fire, Mrs. Bryte and her care-giver, Donna Miller, were in the apartment alone. During the late morning or early afternoon, Mrs. Miller assisted Mrs. Bryte into the recliner and then retrieved the electric throw from the back of the love-seat. Mrs. Miller covered Mrs. Bryte with a blanket, then with the throw, plugged the throw in to a wall outlet to the left of the recliner, and turned it on to the low setting. The throw was not tucked in around Mrs. Bryte's sides. The power cord extended, at Mrs. Bryte's feet, from the throw, and the temperature control rested on the floor to Mrs. Bryte's left below her feet. Mrs. Bryte did not adjust the temperature control herself. At around 11 a.m., Mrs. Miller had lighted the candle that sat on the small table to the right of the recliner. According to Mrs. Miller, at that time the candle was partly burned, and, as far as she saw, the flame had not extended above the rim of the glass candle container. Mrs. Miller also testified that Mrs. Bryte was unable to reach the candle, or the lamp that also was on the table. Mrs. Bryte could, however, reach a part of the table for such things as a denture cup, a Star magazine, a cookbook, a Bible and her glasses.

Mrs. Miller left the apartment at 1:55 p.m. to pick up Mrs. Bryte's granddaughter from school, leaving the candle lighted and the electric throw turned on. Mrs. Miller returned

to the apartment at, she estimated, 2:08 p.m., at which time she heard Mrs. Bryte calling for help. Upon entering the apartment, Mrs. Miller saw smoke and fire coming up the left side of Mrs. Bryte's recliner and heard "snapping and cracking." Mrs. Miller did not see any flames related to the power supply cord of the electric throw and she could not identify more specifically the source of the flames, other than the fact that the flame was "down beside [Mrs. Bryte's] chair and up on her leg." Mrs. Miller tried, but was unable, to extinguish the fire. While in the apartment, however, Mrs. Miller was able to see that the candle was still lighted and that neither it nor the lamp had been moved or overturned. The flames and smoke forced Mrs. Miller to flee the apartment to get the children out.

Shortly after the fire was extinguished, and before the removal of Mrs. Bryte's remains, Assistant State Fire Marshall Mack Dennis was called to the scene. At that time, Dennis had been employed by the West Virginia State Fire Marshall's Office as a cause and origin investigator for over 20 years. While he was not certified as a fire investigator, he had attended numerous courses in arson and explosive investigation. Dennis' investigation of the fire scene traced the fire's path, starting from Mrs. Bryte's left side and moving around the room. Dennis took photographs of the fire scene and made a not-to-scale diagram of the room where the fire occurred, which located the large artifacts in the room. Dennis took oral, not written, statements from the witnesses to the fire.

Dennis' diagram did not indicate the wall outlets located in the room. He did observe, however, that the wall outlet immediately to Mrs. Bryte's left "had an electrical service cord plugged into it, and the remains of that cord came over to Mrs. Bryte and was [sic] laying across her arm." Dennis'

report later characterized the cord as "wrapped around" Mrs. Bryte's left arm. He did not measure the cord or the exact distance between the wall outlet to her left and Mrs. Bryte's body, but approximated the distance to be "two and a half feet." Dennis did not recover or photograph the service cord that he saw draped across Mrs. Bryte's body. Indeed, Dennis did not know at first what this cord was for; only later, after speaking with family members and Mrs. Miller, did he learn that Mrs. Bryte had been using an electric throw at the time of the fire.

Dennis did not know that there was a lamp, or observe any other cord, plugged in to the same wall outlet as the cord found on Mrs. Bryte. But there was another cord, an extension cord running from a wall outlet behind the chair, to the lamp on the table. Moreover, he did not inspect the outlet's wiring. Dennis nonetheless excluded the outlet, and also the table, candle, and lamp as potential origins of the fire based on his discussions with Mrs. Miller and family members. Also, he made this determination without knowing how the candle had been lighted.

Dennis' only report, issued the day of the fire, concluded that the cause of the fire was "improper use of an electric blanket." Specifically, Dennis recorded Mrs. Miller as having told him that the electric throw was "around" Mrs. Bryte. Dennis later may have concluded, for reasons that are unclear due to interruptions in his testimony, that the throw may not have been used improperly. But he nevertheless maintained that the throw was the cause of the fire.

Critically, Dennis did not recover any artifacts or samples from the scene. Dennis testified that he had no reason to do so, nor did he advise the Brytes to preserve the fire scene or any of its artifacts, for the same reason: "I had no reason to

believe it [the fire] was other than accidental." Apparently no one, until his attorney did, instructed David, Mrs. Bryte's son, about preserving evidence from the fire scene, and David removed the debris, including the recliner and electrical devices, and disposed of it at a landfill that he owned.[1]

Plaintiffs filed this suit about six weeks later, on December 1, 2000.[2] In addition to Dennis, plaintiffs retained Dr. W.T. Cronenwett as an expert witness to offer opinion testimony regarding the specific cause of the fire. In his first deposition, Dr. Cronenwett opined that the electric throw was the ignition source of the fire. He based that opinion on "the absence of any other ignition source in the area, the snapping and crackling that was heard, the fact that Mrs. Bryte was confined to her chair, did not smoke and had no opportunity or means to set herself on fire, and the fact that there are--have been a number of instances where the Sunbeam electrically heated bedding products have spontaneously burst into flames." More specifically, Dr. Cronenwett testified that the blanket caused the fire due to defectively designed circuitry. He acknowledged, however, that his opinion that the defective circuitry in the throw had caused the fire rested wholly on the conclusion of Dennis.[3] Dr. Cronenwett attributed his inability to independently identify the specific

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[1] The magistrate judge credited Mr. Bryte's explanation for disposing of the debris, to which exception is not taken.

[2] Plaintiffs settled with the other named defendant, Sears Roebuck & Co., before trial.

[3] Dr. Cronenwett also relied on the investigation of David Dallas, another cause-and-origin witness. The district court did not refer to either Dallas' or Hull's testimony. We do not rely on either. Dallas did not testify at trial.

source of ignition to the fact that there was "no remaining physical evidence" after the fire.

Dr. Cronenwett was deposed twice, the second time in April 2003. In addition to repeating his earlier questions, counsel for defendant repeatedly asked Cronenwett whether he could identify evidence of a malfunction in the electric throw that could reliably support his conclusion that the electric throw caused the fire. To each such question with respect to various specific defects, Dr. Cronenwett acknowledged that he could not, explaining, for example, that ". . . I never saw any physical evidence of the blanket, so I don't know what specific--what the specific cause of the ignition was." Moreover, when asked whether there was "any evidence in this case that can reliably support a conclusion that there was any defect in any component part of the electric throw that caused the fire in this case?" Dr. Cronenwett responded "No." (JA 2019.)

Prior to trial, defendant moved for summary judgment based on failure of causation and plaintiffs' spoliation of the physical evidence of the fire. Defendant also moved to exclude the testimony of Dennis and Dr. Cronenwett (and Messrs. Dallas and Hull) under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), on the related ground that neither had a reliable basis for his opinion that the electric throw or a defect therein had caused the fire. In his Report and Recommendation, the magistrate judge recommended denying defendant's motions, except as to Dallas, whose opinion he deemed unreliable. Defendant objected to the Report and Recommendation; the district court overruled those objections but treated the motions as pending, took them under advisement, and instructed the parties that it would rule on them at trial.

The case was tried on December 8, 2003. At trial, plaintiffs attempted to offer the expert testimony of Dennis and Dr. Cronenwett in support of the claims that (1) the electric throw was the cause of the fire, and (2) a design defect in the blanket was specifically responsible for ignition. Contrary to the Report and Recommendation, the district court considered plaintiffs' proffers and determined that, under *Daubert*, neither expert had a sufficiently reliable basis for his opinion, and it thus excluded Dennis' and Dr. Cronenwett's testimony as to causation. The district court also excluded plaintiffs' evidence about other, similar accidents and reports of defects. The district court then concluded that plaintiffs had not introduced evidence sufficient to permit a jury finding that the electric throw had caused the fire. Therefore, at the conclusion of plaintiffs' case the district court granted defendant's Rule 50(a)(1) motion for judgment as a matter of law. This appeal followed.

II.

Plaintiffs assert five assignments of error:

I. THE TRIAL COURT FAILED TO PROPERLY APPLY THE "MALFUNCTION THEORY" OF CIRCUMSTANTIAL EVIDENCE IN PRODUCTS LIABILITY CASES WHEN THE PRODUCT IS DESTROYED.

II. THE TRIAL COURT MISAPPLIED THE FLEXIBLE *DAUBERT* ANALYSIS OF RULE 702 TO EXCLUDE EXPERT TESTIMONY FROM MACK DENNIS AND DR. CRONENWETT BECAUSE THERE WAS NO TESTING.

III. UNDER THE "MALFUNCTION THEORY" OF CIRCUMSTANTIAL EVIDENCE, OTHER RELEVANT EVIDENCE OF PRODUCT DEFECT AND SAFETY SHOULD HAVE BEEN ADMITTED.

IV. EITHER WITH OR WITHOUT THE IMPROPERLY EXCLUDED EVIDENCE, THERE WAS SUFFICIENT CIRCUMSTANTIAL EVIDENCE TO SUBMIT THE CASE TO THE JURY.

V. THE TRIAL COURT'S CONDUCT DURING TRIAL DEMONSTRATED BIAS, PREJUDGING OF THE CASE, AND OVERALL MEDDLING IN THE PRESENTATION OF EVIDENCE SO AS TO DEPRIVE PLAINTIFFS OF DUE PROCESS AND A FAIR TRIAL BEFORE AN IMPARTIAL TRIBUNAL. (Appellants' Br. i, ii.)

Appellate review of a district court's interpretation or application of state law is *de novo*. See *James v. Circuit City Stores, Inc.*, 370 F.3d 417, 421-22 (4th Cir. 2004). Conversely, the district court has broad latitude in ruling on the admissibility of evidence, including expert opinion, and we will not overturn *Daubert* evidentiary rulings with respect to relevance and reliability absent an abuse of discretion. See *GE v. Joiner*, 522 U.S. 136, 141-42, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). A district court abuses its discretion if its conclusion is guided by erroneous legal principles, or if it rests upon a clearly erroneous factual finding. See *Westberry v. Gislaved Gummi, A.B.*, 178 F.3d 257, 261 (4th Cir. 1999).

Finally, we review *de novo* the district court's grant of judgment as a matter of law, see *Freeman v. Case Corp.*, 118 F.3d 1011, 1014 (4th Cir. 1997), *cert. denied*, 522 U.S. 1069, 139 L. Ed. 2d 676 (1998), considering the evidence in the light most favorable to the non-moving party, see *Brown v. CSX Transp. Co.*, 18 F.3d 245, 248 (4th Cir. 1994).

Taken together, we must determine whether the admissible evidence, viewed most favorably to plaintiffs, would have allowed the jury to render a verdict in their favor under West Virginia law.

III.

We first address assignments of error I and II which state plaintiffs' principal claim on appeal, which is that the district court erred in applying *Daubert* rather than substantive West Virginia law as to causation. In essence, plaintiffs rely on several West Virginia cases and argue that, when a product allegedly causing a fire has been destroyed by that fire, plaintiffs are allowed to rely on the "Malfunction Theory" and circumstantial evidence to prove that a defect in that product caused the fire. The argument goes that evidence as to causation is not controlled by *Daubert* and the Federal Rules of Evidence, rather by the substantive law of West Virginia which is claimed to embrace the "Malfunction Theory" of proof of causation.

Plaintiffs characterize the district court's decisions on evidence as reversible disregard for West Virginia law. The following colloquy at trial succinctly illustrates plaintiffs' argument and the district court's explanation for rejecting it:

> Plaintiffs' attorney: "The law in the Fourth Circuit and in West Virginia is that an expert need not review

> product remains to arrive at an opinion as to the probable defect in it."
>
> Court: "The evidence [law] is the Federal Rules of Evidence."

As the transcript shows, plaintiffs essentially advocate applying West Virginia law rather than the Federal Rules of Evidence where, as here, products-liability claims, destruction of physical evidence, causation, and expert testimony converge.

The position of the district court was correct and has been decided in *Cavallo v. Star Enterprises*, 100 F.3d 1150 (4th Cir. 1996). In that case the district court, as here, entered a judgment for the defendant, having excluded expert testimony as to the cause of the various chronic illnesses of the plaintiff. The expert witnesses had offered testimony that the plaintiff's exposure to petroleum vapors from jet fuel spilled or leaked by the defendant had caused the plaintiff's illnesses, upon which she sued. The court excluded the evidence because it was not supported by appropriate validation, as required by *Daubert v. Merrell Dow*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The position of the *Cavallo* plaintiffs in Virginia, similar to that taken here by the *Bryte* plaintiffs in West Virginia, was that Virginia law should apply as to the admissibility of the testimony:

> The Cavallos assert that, because their claims are grounded in Virginia state law and were originally filed in Virginia state court, the admissibility of expert testimony should be governed by Virginia law.

However, we followed our decision in *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4th Cir. 1986) and affirmed the district court, quoting from *Scott*, 789 F.2d at 1054:

> Unlike evidentiary rules concerning burdens of proof or presumptions, the admissibility of expert testimony in federal court sitting in the diversity jurisdiction is controlled by federal law. State law, whatever it may be, is irrelevant.

100 F.3d 1150, 1157.

This argument has been rejected by other Courts of Appeals in similar cases dependent on expert testimony. For example, in *Ealy v. Richardson-Merrell, Inc.*, 283 U.S. App. D.C. 137, 897 F.2d 1159 (D.C. Cir. 1990), the defendants appealed the district court's denial of their motion for judgment N.O.V. in a Bendectin birth-defects case. Plaintiffs defended the verdict in their favor by arguing that *Erie Railway Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), required the district court to follow an earlier District of Columbia Court of Appeals decision that had affirmed a jury verdict for different plaintiffs based on the "same four types of expert data" relied upon by the federal plaintiffs. *Ealy*, 897 F.2d at 1163. The D.C. Circuit agreed with defendants that reliance on state (decisional) law was not required. *Ealy*, 897 F.2d at 1160 ("the admissibility of expert testimony [is] a procedural matter which does not implicate the principles underlying *Erie*") (citation omitted). The court explained its holding, that the district court abused its discretion in admitting unreliable expert testimony accepted by the state court, in terms applicable to this case:

> Unfortunately for [plaintiffs], the only evidence they have on the issue of scientific causation is the

> testimony of their experts. Once that testimony is deemed inadmissible, it is self-evident that the evidence is insufficient to support a verdict for the plaintiffs. Contrary to the [plaintiffs'] assertions, however, this court is enforcing a procedural rule governing admissibility; it is not supplanting substantive state rules on the sufficiency of evidence.

Ealy, 897 F.2d at 1163; cf. *Daubert v. Merrell-Dow Pharms., Inc.*, 43 F.3d 1311, 1322 (9th Cir. 1995) (affirming summary judgment for defendants: "plaintiffs do not quantify this possibility [of causation], or otherwise indicate how their conclusions should be weighted, even though the substantive [state-law] legal standard has always required proof of causation by a preponderance of the evidence"), *on remand from* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). These decisions highlight the application in the federal courts of the process that plaintiffs argue is a "misapplication" of West Virginia law, rather we are of opinion that it is an application of the rules of evidence under *Daubert*.

Without significant exception, plaintiffs relied on Dennis' testimony to establish that the throw caused the fire.[4] But Dennis did not exclude all or even most of the other possible sources of the fire. As set forth above, it is undisputed that Dennis did not physically examine the lamp, the candle, the cord that remained which he found on Mrs. Bryte's arm, or

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[4] As set forth above, Dr. Cronenwett was proffered to testify as to defective electric circuits, not the fire's origin. Dennis' causation testimony was an obligatory support for Dr. Cronenwett's, as Cronenwett acknowledged. Because we affirm the district court's exclusion of Dennis' opinion, we do not address in great detail the particulars of most of Dr. Cronenwett's testimony.

the wall outlet, or its wiring, which supplied electricity to the throw. Moreover, he was unaware that an extension cord was plugged into the same outlet as was the blanket, and therefore he obviously did not inspect it. These omissions are particularly revealing in light of Mrs. Miller's testimony that she could not unplug the throw because she "would have gotten burned if [she] tried to pull [the cord] out," which suggests fire on the left side of the chair near the outlet, even if not in or on the outlet itself. It is clear that such possibilities have not been excluded in any methodical or reliable fashion. And we are not obliged to credit Dennis' say-so supporting his own reliability by way of excluding other causes. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 at 157, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

Plaintiffs also assert that Dennis adequately excluded the most likely alternative source of the fire, the candle, based on Mrs. Miller's observation that the candle was still lighted when she arrived at the scene, as well as on the evidence that Mrs. Bryte could not reach the candle. We do not think that Dennis' explanation is sufficient to explain away the candle. Our doubt arises not because of Dennis' reliance on Mrs. Miller's observations, but because the fact that she saw the lighted candle on the table in itself cannot exclude it as a cause of the fire, rather the contrary inference is the more logical. This is a matter of common sense: for example, the candle's flame might have burned the lamp shade above, as defendant suggested when cross-examining Mrs. Miller, or either the blanket or the throw may have been ignited upon contact with the candle which may have been within reach of the decedent. Notably, though Mrs. Miller and Mrs. Bryte's daughter testified that the candle was out of Mrs. Bryte's reach, Dennis did not independently investigate why what appeared to be the table's remains were found close to the recliner, and his only explanation for this was the implausible

one that a fireman had kicked the debris. The table with the candle on it was described by Dennis as "immediately to your left of" the recliner, and a photo in evidence shows the table as adjacent to the recliner.

Daubert aims to prevent expert speculation, and our review of the record convinces us that Dennis' failure to independently evaluate the open flame in the room cannot be reconciled with the reliability mandate. Dennis was permitted to rely on what Mrs. Miller saw, but not on her conclusions about the cause of the fire. As to the candle he essentially did the latter.

We also note that, at the beginning of the trial, the justifiable impression of the district court, the depositions of most of the witnesses having been taken, when Mrs. Miller left to get the child, "there was a candle lighted on a table within reach of the decedent."

Plaintiffs also argue that Dennis performed a methodical walk-around inspection, which led him to the origin of the fire. Dennis' investigation did indeed determine that the left side of Mrs. Bryte was the "area of origin" for the fire--but he could not identify the "point of origin." And, as seen above, Mrs. Miller testified as well that the fire was on the outside of the chair, and on Mrs. Bryte's left side as well. Thus, though both Dennis' "area of origin" finding and Mrs. Miller's testimony implicated the area where the outlet and the two power cords were located, Dennis did not closely examine this area and was unaware of a cord lying inches from the recliner, plugged in to the same outlet as the throw. This is inconsistent with the NFPA standards, which require investigators to exclude "all other reasonable origins and causes." NFPA 921, § 2-3.6 (1999 ed.).

Furthermore, Dennis' causation testimony is called into question by the fact that Dennis may have sought to explain his conclusion about "improper use" of the throw, based upon the fact he "had information that . . . [the throw] had been tucked down in beside the victim in the chair and which I later learned the old style electric blankets . . ."

While the testimony of Dennis was cut short before he had explained his use of the phrase "improper use" with respect to the throw, the proffered testimony of Dr. Cronenwett with reference to causation is instructive. The "snapping and crackling noises" referred to throughout and referred to by Mrs. Miller are "characteristic of burning . . . energized PTC cable" not the burning of an energized power or service cord, for, "generally, when a service cord short-circuits it explodes once and opens a circuit breaker. It would not continue to snap and crackle." Thus, "the burning of an energized service cord for an appliance would be inconsistent with a snapping and crackling sound described by Ms. Miller." Dr. Cronenwett had no information that the circuit breaker was tripped in the line into which the throw had been plugged. But because snapping and crackling came from the burning PTC cable,[5] he logically excluded a burning of the power cord to the throw as the cause of the fire. Apparently unknown to Dr. Cronenwett, however, the circuit breaker, in the line into which the throw was plugged, was tripped. When it was tripped is not shown in the record. That it was tripped is shown by the testimony of David Bryte, the son of the decedent: "The breaker on that particular circuit was tripped." With the power cord possibly removed as the origin of the fire, and the burning of the PTC cable as the origin of

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[5] A PTC cable is the cable containing the heating element and runs throughout the throw.

the snapping and cracking, it then is relevant to consider the testimony of Dr. Cronenwett that "the PTC wire could also burn from being attacked by an outside fire source as well." But does, or doesn't, the tripped circuit breaker make the various cords (or their appliances) plugged into the circuit, candidates for the origin of the fire.

All of these reasons serve to support the decision of the district court in excluding the causation testimony of Dennis, and we are of opinion the district court did not abuse its discretion in excluding that testimony. It described the record at this point as "so speculative that a jury has to guess to determine whether there is liability of either the warranty or negligence for the jury to speculate on."

IV.

In the third assignment of error, plaintiffs challenge the district court's exclusion of other evidence such as "other accidents including the same product." Here, too, we find no abuse of discretion. See *Westberry*, 178 F.3d at 261.

Plaintiffs rely largely on this court's decision in *Riley v. De'Longhi Corp.*, 2000 U.S. App. LEXIS 27082, No. 99-2305 (4th Cir. Oct. 30, 2000), in support of their argument regarding other relevant evidence.[6] In *Riley*, we determined that four of the five factors applicable to analyzing the sufficiency of evidence of a product defect under Maryland law favored reversing summary judgment for the defendants.

---

[6] Our mention of *Riley* is no indication that we rely on it as binding circuit precedent. See Fourth Circuit Local Rule 36(c); *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) (en banc).

Under *Riley*, the rule in Maryland in deciding whether there is sufficient circumstantial evidence of a product defect to proceed to trial, is that the court considers five factors: (1) expert testimony as to possible causes; (2) the occurrence of the accident a short time after sale; (3) same accidents in similar products; (4) the elimination of other causes of the accident; and (5) the type of accident which does not happen without a defect.

As to each factor:

(1) The testimony of Dennis, that the fire originated in the throw, was inadmissible, so there was no expert testimony as to the possible cause.

(2) The fire in this case occurred some two years after the sale, so there might be a question of fact as to whether the accident occurred a short time after sale.

(3) As the district court correctly held, there was no proof that the facts in this case were the same or similar to what transpired in the other cases, so there was no showing of the same accident in similar products.

(4) In this case the elimination of other causes of the accident has not been shown, as we have related above, so there has been no showing of the elimination of other causes of the accident.

(5) Since there is no showing of the cause of the accident, there has been no showing of a type of accident which does not happen without a defect. Thus, even under *Riley*, the evidence of "other accidents involving the same product" is not admissible, only one factor possibly being favorable.

A general logical fallacy similar to that mentioned just above undermines plaintiffs' theory that the district court was required to admit evidence of substantially similar incidents and reports implicating a Sunbeam throw. That is, plaintiffs sought to introduce such evidence without establishing their premise: the salient characteristics of this incident, as well as of the incident to which comparison is sought. The district court commented:

> And I agree with [plaintiffs' counsel] one hundred percent [that it is proper to bring evidence of other similar incidents]; and once you get a witness who testifies that this is similar to what went on in these other cases, I might let it come in . . . .

We are of opinion that the district court did not abuse its discretion in denial of evidence of "other accidents involving the same product."

V.

The fourth issue is plaintiffs' argument that "with or without the improperly excluded evidence, there was sufficient circumstantial evidence to submit the case to the jury." We review *de novo* the district court's grant of judgment as a matter of law. See *Freeman v. Case Corp.*, 118 F.3d at 1011, 1014 (4th Cir. 1997). Though we consider the evidence in the light most favorable to the non-moving party, *Freeman*, 118 F.3d at 1014, given our affirmance of the district court's decisions as to the admissibility of evidence, the required result is judgment for the defendant. With no witness as to ignition, there simply was no evidence of causation other than Dennis,' and via that, Dr. Cronenwett's, testimony. As in *Ealy*, "the only evidence [plaintiffs] have on the issue of scientific causation is the

testimony of their experts. Once that testimony is deemed inadmissible, it is self-evident that the evidence is insufficient to support a verdict for the plaintiffs." 897 F.2d at 1163 (emphasis added). We are of that same opinion here and so hold.

The judgment of the district court is accordingly

AFFIRMED.[7]

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[7] We have also considered the plaintiffs' argument that the trial judge's "conduct during trial" demonstrated bias, prejudging of the case, and overall meddling in the presentation of evidence so as to deprive plaintiffs of due process and a fair trial. We have examined the record and are of opinion that the argument is without merit, and we so hold.

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Case No. 04-1051

[Filed December 19, 2005]

DAVID BRYTE, Personal Representative of the Estate of Lova E. Bryte, deceased; DAVID BRYTE; KATHY B. SMITH; JAMES B. SMITH; M.E. SMITH, a minor, by and through her legal guardian, Kathy B. Smith; DONNA J. MILLER,
Plaintiffs-Appellants,

v.

AMERICAN HOUSEHOLD, INCORPORATED, formerly known as Sunbeam Corporation; SUNBEAM PRODUCTS, INCORPORATED,
Defendants-Appellees,

and

SEARS ROEBUCK AND COMPANY,
Defendant.

On Petition for Rehearing and Rehearing En Banc

The Appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Niemeyer, and Judge Luttig.

For the Court

/s/ Patricia S. Connor

_____

CLERK

APPENDIX C

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, ELKINS DIVISION

Case No. 2:00-CV-93

[Filed December 8, 2003]

DAVID BRYTE, Personal Representative of the Estate of Lova E. Bryte, Deceased, et al.,	)
Plaintiffs,	)
v.	)
SUNBEAM CORPORATION,	)
Defendant.	)

RECORD OF PROCEEDINGS
BEFORE RICHARD L. WILLIAMS, JUDGE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA
(and Jury)

* * *

[p. 175]

THE WITNESS: I was never back within the scene.

THE COURT: And when you left on October 23, did you take the remnants of the blanket, all of the electrical cords and all of the other things to do a scientific study on them so you could revise your opinion?

THE WITNESS: No, sir, I did not.

THE COURT: And were they made available to you at any point so that you could revise it?

THE WITNESS: I could have taken them but I had no need to.

THE COURT: And nobody ever made them available to you.

THE WITNESS: They were never offered to me, but I never asked for them either.

THE COURT: So you never inspected any of the raw material that was involved?

THE WITNESS: Other than just what was laying about in the scene when I was there.

THE COURT: Your motion is denied.

BY MR. McLAUGHLIN:

Q. Mr. Dennis, while you were at the scene, were there remnants of any electrical devices around the body?

A. The one thing that I saw was what appeared to be the service cord for the electric throw as you call it.

APPENDIX D

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA, ELKINS DIVISION**

Case No. 2:00-CV-93

[Filed December 8, 2003]

DAVID BRYTE, Personal Representative of the Estate of Lova E. Bryte, Deceased, et al., *Plaintiffs*,	)
v.	)
SUNBEAM CORPORATION, *Defendant*.	)

**RECORD OF PROCEEDINGS
BEFORE RICHARD L. WILLIAMS, JUDGE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA
(and Jury)**

* * *

[p. 200]

THE COURT: I mean, the answer is self-evident. It is to make the product safer, isn't it, Mr. Witness?

THE WITNESS: There are details that are more important than that.

THE COURT: Well, like what?

THE WITNESS: The little wires inside the PTC cable tend to break. The patents say that these wires will break and a safety circuit is mandatory to prevent fire.

THE COURT: All right, that's fine. So that burns it out.

BY MR. McLAUGHLIN:

Q. Doctor, you say you studied the function of the safety circuit?

A. Yes, sir.

Q. You studied the effectiveness of the safety circuit?

A. Yes, I have. I have studied that as well.

Q. Based upon your study, do you have an opinion as to the effectiveness of the safety circuit in performing the function that you just described in preventing fires caused by breaks in these wires?

MR. MOFFETT: Objection. Foundation and also relevance.

THE COURT: It isn't probative of anything in this case until we find out from a competent witness that the [p. 201] failure in this particular product was what he is talking about.

Then this has no relevancy. So move along, counsel.

BY MR. McLAUGHLIN:

Q. Doctor, you have heard the evidence about the fire today, correct, from the other witnesses?

A. Yes, sir, I have.

Q. Based upon that evidence, have you been able to form an opinion as to what, if any, the defect was in the Lova Bryte electric blanket?

MR. MOFFETT: Same objection.

THE COURT: The objection is sustained until there has been a foundation that this particular product was examined and that that was the failure. This is just total speculation; and under the qualifications for an expert, I have to make those findings, and I am finding that he does not have sufficient raw material to formulate his opinion. So move along.

BY MR. McLAUGHLIN:

Q. Doctor, do you need to examine the physical remains of the property in order to come to your opinion in this case?

A. No, I do not.

MR. MOFFETT: Excuse me, Your Honor.

[p. 202]

THE COURT: I have ruled that I'm not letting him express his opinion.

Now, you heard me, didn't you, counsel?

MR. McLAUGHLIN: I did, Your Honor.

THE COURT: All right, fine.

Until you show the raw material that would give him a basis for this foundation, it is speculative.

MR. McLAUGHLIN: Your Honor, may I have a moment?

THE COURT: All right. Suppose I give the jury a ten minute stretch recess while you all conference and then we'll move on from there.

Ladies and gentlemen, we will take a ten minute stretch recess.

Leave your notebooks on your seats.

Doctor, after the jury leaves, you can stand down, sir.

THE WITNESS: Thank you, sir.

(The jury exited the courtroom, at which time the following proceedings transpired:)

THE COURT: Recess court for ten minutes or until such time as the jury is ready to proceed.

(Recess taken in proceedings at 3:30 p.m.)

R-E-C-E-S-S

(Proceedings reconvened at 3:45 p.m.)

(Jury entered the courtroom at which time the following [p. 203] transpired:)

(William Treadwell Cronenwett resumed the witness stand at this point.)

THE COURT: Proceed.

BY MR. McLAUGHLIN:

Q. I ask that the witness please turn to Exhibit 329.

A. Yes, sir, I have 329.

Q. Do you know what that is?

A. This is my CV.

Q. It is your resume?

A. It is my resume, yes.

MR. HANSEN: I move the admission of 329.

THE COURT: Received without objection.

(Plaintiff's Exhibit No. 329 received into evidence at this point.)

BY MR. McLAUGHLIN:

Q. Doctor, based upon the evidence that you have heard in this court, have you heard any evidence of improper use of Lova Bryte's electric blanket?

MR. MOFFETT: Objection, Your Honor. There is no foundation and also relevance.

THE COURT: The objection is sustained.

BY MR. McLAUGHLIN:

Q. Doctor, are you familiar with the proper uses of Sunbeam [p. 204] PTC technology electric blankets?

MR. MOFFETT: Objection, Your Honor. Foundation, and again, relevance.

THE COURT: The use of that would be such a variable that he can't possibly speculate on all of the different uses you can put to it but the objection is sustained.

BY MR. McLAUGHLIN:

Q. Doctor, do you have an opinion as to whether or not Sunbeam electric blankets with triode-based safety circuits are defective as designed?

MR. MOFFETT: Objection, Your Honor. Foundation.

THE COURT: I have ruled that the objection is sustained.

BY MR. McLAUGHLIN:

Q. Doctor, do you have an opinion as to whether the Sunbeam electric blankets with the triode-based safety circuit are unreasonably dangerous?

MR. MOFFETT: Same objection, Your Honor.

THE COURT: It is sustained.

BY MR. McLAUGHLIN:

Q. Doctor, do you as an electrical engineer have an opinion to a reasonable degree of certainty as to cause of the [p. 205] electric blanket catching fire on October 23, 2000, on Lova Bryte?

MR. MOFFETT: Objection, Your Honor.

THE COURT: The objection is sustained.

Counsel, I have ruled on this, and I'm normally not accustomed to repeating myself on rulings a great deal. Your displeasure of my rulings are a matter of record.

MR. McLAUGHLIN: May I request a side bar.

THE COURT: Move along, but I'll hear you.

(Side bar on the record.)

MR. McLAUGHLIN: Your Honor, I fully respect the court's rulings and at this point I'm frankly just wanting to make my record for purposes of appeal.

THE COURT: Right.

But after the witness has finished and before he is discharged, I'll let you flush out the record to give his opinion or you can state it so that there will be a flushed out record, all right.

MR. McLAUGHLIN: Thank you.

MR. HANSEN: Can I speak?

THE COURT: Yes.

MR. HANSEN: Your Honor, the evidence or the law in the Fourth Circuit in West Virginia is that an expert need not review product remains to arrive at an opinion as to the [p. 206] probable defect in it.

THE COURT: The evidence is the Federal Rules of Evidence. I'm just telling you a lot of clients self-destruct by throwing away the evidence that is needed, but this case is totally speculative, and that is the reason you get to go to the Fourth Circuit, and I hope you will, because I think you are going down the tube. That is the reason I told you to settle it because you had a offer. If you want to settle it, settle it, but I want you to know that if you go up there, you are playing to the big boys and you are going to the jury.

MR. HANSEN: Would you give us an extensive offer of proof?

THE COURT: I sure will.

(Side bar concluded.)

BY MR. McLAUGHLIN:

Q Doctor, would other electric blankets made by Sunbeam purchased by consumers prior to 1998 but after 1990 be all substantially similar to the product in this case?

MR. MOFFETT: Objection. Relevance.

THE COURT: From '88 to '93.

MR. McLAUGHLIN: From 1990 through 1998 I'm just asking if they would be substantially similar products.

[p. 207]

THE COURT: Well, on a foundation question, ask him how many of them were marketed during that time span. Were they up in the millions or billion or what?

Do you know, doctor?

THE WITNESS: I believe that they were being manufactured at the rate of about three million a year.

THE COURT: And you didn't examine them all obviously?

THE WITNESS: No, sir.

THE COURT: But you think the technology was about the same on all of it?

THE WITNESS: Yes, sir.

THE COURT: All right, that burns it out. Now, move alone.

MR. McLAUGHLIN: Based on our other discussions, I have no other questions of this witness.

THE COURT: No cross-examination?

MR. MOFFETT: No cross-examination.

THE COURT: And, doctor, remain in attendance because I think they may need to put you on the record for other purposes.

THE WITNESS: All right, sir.

THE COURT: All right, you may return to your seat.

APPENDIX E

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, ELKINS DIVISION

Case No. 2:00-CV-93

[Filed December 8, 2003]

DAVID BRYTE, Personal Representative of the Estate of Lova E. Bryte, Deceased, et al., *Plaintiffs*,	)
v.	)
SUNBEAM CORPORATION, *Defendant*.	)

RECORD OF PROCEEDINGS BEFORE RICHARD L. WILLIAMS, JUDGE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND, VIRGINIA (and Jury)

* * *

[p. 122]

. . . into the apartment?

A. Opened the outer door that goes into the hallway into the apartments.

Q. Before you opened the door, could you tell if there was anything wrong?

A. No.

Q. When you opened the door, what did you notice first?

A. Lova hollering, "Donna, come here quick."

Q. What did you do when you heard that?

A. I then went straight back to her living room.

Q. Where was your one-year-old grandson?

A. I still had him. I was carrying him. I still had him in my arms.

Q. Where was Megan?

A. She was right beside of me.

Q. Did you have to go down the hallway?

A. Yes.

Q. As you went down the hallway, did you see anything unusual?

A. No.

Q. When you got to the end of the hallway, what did you see?

A. When I stepped into the living room, I seen fire.

Q. Where did you see fire?

[p. 123]

A. On Lova's left side, on the blanket and up on her burning.

Q. What was burning?

A. The blanket.

Q. What position was Lova in?

A. She was still reclined in her chair.

Q. And did it appear to you that the chair had moved at all?

A. No.

Q. What did you do when you saw the fire? When you saw the fire, what did you do?

A. I grabbed something. I have no idea what it was. I tried getting it out. When I tried, it just kept coming back up, shooting up, and I heard snap and crackling.

Q. So what was Lova saying at that time?

A. The last thing she said that I can remember was "Please, Donna, get me out of this chair."

Q. Okay.

A. "Get me up."

Q. What did you say?

A. I told her I couldn't right now; I had to try to get the fire out.

Q. How did you try to get the fire out?

A. I grabbed something off of the loveseat to pat it with [p. 124] but I do not know what it was.

Q. As you tried to get the fire out, what happened?

A. The smoke started getting really bad and I could smell it real bad. I could feel it in my nose, so I had to get the kids out.

Q. What was the fire doing at that time?

A. The last I remember, it was burning and there was black smoke.

Q. Was there any fire behind the chair?

A. No.

Q. Did you notice whether the lamp was on or off?

A. I didn't notice at the time.

Q. Did you look for the candle?

A. I glanced over. The candle was still in the same position where I put it.

Q. Why did you look for the candle?

A. I don't know. I just automatically looked there.

Q. Had it moved in any way?

A. No.

Q. Was it turned over?

A. No.

Q. Was the lamp moved in any way?

A. No.

Q. Was it turned over?

[p. 125]

A. No.

Q. Was there any fire anywhere else in the room?

A. No.

Q. So then what did you do?

A. I seen when it was getting so bad I took the kids out on the porch. Well, Megan had called 911. They were giving her

a hard time. She gave it to me and I couldn't remember the address or nothing. So we went out on the porch and I gave the phone to someone else and they talked to them.

Q. Did you try to go back in?

A. I turned to go back in but I couldn't because there was so much smoke in the doorway.

MR. McLAUGHLIN: Your Honor, may I have one moment.

THE COURT: Yes.

(Pause in proceedings.)

BY MR. McLAUGHLIN:

Q. Donna, when you were there trying to put the fire out, what side were you on or where were you standing?

A. I was standing facing her left and I was trying to put the fire out because it was on her left side. The blanket was burning up over and up in towards her chest. The blanket was burning on her.

Q. Was there any fire over on the wall to the right where [p. 126] the outlet was?

A. No.

Q. Was there any fire on the floor by the outlet?

A. No, just on the blanket by her leg.

MR. McLAUGHLIN: I have no other questions. Thank you.

THE COURT: We will defer cross-examination until after lunch. I don't think you can finish in the next ten minutes, and I usually take lunch at one o'clock.

Mrs. Miller, you are now under oath. So don't discuss your prior testimony with anyone during the luncheon recess.

THE WITNESS: Okay.

THE COURT: You can now stand down.

Ladies and gentlemen, we will be in recess until two o'clock. I don't know whether you are familiar with the gourmet hot spots around here, but I'm sure some of the court attaches can tell you where they are.

If there are any vendors that want to give you take-out food and you want to bring it back to the jury room, that is perfectly acceptable.

Again, leave your handouts in your seats and they will remain there and be secure while you are away.

Everyone remain seated while the jury departs.

(The jury exited the courtroom, after which time the. . .)

* * *

[p. 134]

. . . shade?

A. Not that I recall.

Q. It could have been though, right?

A. I don't recall.

Q. In looking at this photograph, Mrs. Miller, does this photograph show Mrs. Bryte's right arm?

A. Yes.

Q. And isn't it true that she had the ability on her right side to reach with her right arm over on to the table?

A. Just on the corner where her glasses laid and the book.

Q. You are telling - -

A. She couldn't twist to turn.

Q. You mean from her stroke she couldn't?

A. No, I assumed that's what it was from, that she couldn't twist her whole body.

Q. Did you ever see her reach on to the table beyond the lamp?

A. No.

Q. But it was possible for her to do it, wasn't it?

A. Not that I know of.

Q. Was it possible for her to maybe not reach totally to the candle but reach in that direction and then have the blanket or her sleeve above the candle surface and be heated by that?

[p. 135]

A. No.

Q. Did you ever see Mrs. Bryte take the blanket with her right arm and throw it off towards the left side?

A. No, I did not.

Q. She was capable of doing that, wasn't she?

A. I don't know.

THE COURT: Take the picture down. It is distracting, counsel.

MR. HALL: Pardon me.

THE COURT: I said take the picture down because it is distracting to the jury.

MR. HALL: Yes, sir.

THE COURT: The jury can't listen and watch pictures on the wall at the same time.

MR. HALL: Yes, sir.

BY MR. HALL:

Q. Now, this extension cord for the lamp, that's what I'm referencing now, Mrs. Miller.

Where was the lamp plugged in to that extension cord in relationship to the table and the chair?

Are you able to tell us?

A. The lamp – The extension cord was plugged into the lamp, and it went into the back of her chair and into the wall and into the outlet.

APPENDIX F

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, ELKINS DIVISION

Case No. 2:00-CV-93

[Filed December 8, 2003]

DAVID BRYTE, Personal Representative of the Estate of Lova E. Bryte, Deceased, et al.,	)
Plaintiffs,	)
v.	)
SUNBEAM CORPORATION,	)
Defendant.	)

RECORD OF PROCEEDINGS BEFORE RICHARD L. WILLIAMS, JUDGE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND, VIRGINIA (and Jury)

* * *

[p. 7]

. . . similarity.

And, also, I'm frank to tell you, that the law permits a defendant in products liability cases to examine the alleged offensive product so that it can make a determination on whether it was defective here. Mr. Bryte, for whatever reason he deemed appropriate, destroyed all of the evidence, and I'm not satisfied that the configuration of debris after a fire is much probative of anything. So keep that in mind.

But, in any event, I wanted to give you some guidance of how the trial would be conducted, and I expect you to adhere to the formalities of the rules that I have imposed in all civil cases that I have been presiding over for twenty-seven years as a judge in either federal or state but, in any event, I run a very strict court.

You have to get into vertical when you object; otherwise, I can't hear you.

When you examine the witnesses, you have to get in the vertical and go up to the lectern.

The area between the lectern and the jury box is a DMZ area; and if you need anything ferried over to a witness, Mr. Winn stays loose in the starting block and he will be happy to accommodate you.

Recess court until 9:30 until such time as the jury is. . .

* * *

[p.19]

. . . Beckner.

I work for Dominion Generation. I work in the technical department.

THE COURT: All right.

DOUGLAS R. RINARD (A PROSPECTIVE JUROR): Doug Rinard.

I work for Dominion Generation.

I work for -- (Inaudible)

THE COURT: Is this something about storm?

THE WITNESS: Yes, sir.

THE COURT: All right, now, is there anything about that experience that would prevent you from being fair and impartial should you be selected to serve as a juror?

(No audible response.)

THE COURT: I take it that your silence is a negative answer?

(No audible response.)

THE COURT: There are a couple of other things about the case that I need to call to your attention.

Apparently after this fire, and I think it was reported on 911, the fire people came out, and then the debris was ultimately destroyed, and I think that Mr. David Bryte threw away at the local trash heap after four or five days all of the debris remaining from the fire.

[p. 20]

Now, under our system of justice where a manufacturer of a product is sued by someone claiming that it was defective, they are entitled to have that product delivered to them for inspection to see whether it was defective or not.

Now, because all of the raw material in this case was destroyed, would any of you be prejudiced against the plaintiffs because that action was taken?

And, again, the reasons for doing it may be perfectly innocent but I need to call it to your attention that that did occur.

Now, would that influence any of you if you are called to serve as jurors?

(No audible response.)

THE COURT: Also, the decedent in this case was a handicapped person. She had suffered a couple of strokes that basically made her left hand and left leg useless and she was on a rocker/recliner and was covered by this electric throw on the day in question.

She had a lady who was her caretaker named Donna J. Miller; that Mrs. Miller apparently had some other assignments shortly before this event occurred and she left the

premises where the decedent was lying; and when she left, there was a candle lighted on a table within reach of the decedent; and then when Mrs. Miller came back, the fire was [p. 21] going its way and she saw what was going on and went and called 911 because I think she had a one-year-old child of her own and maybe a smaller child that she had retrieved from school.

Now, because she left a lighted candle on a table within reach of the decedent when she left her post, would that prejudice any of you in the case?

(No audible response.)

THE COURT: Again, any of you think of any reason whatsoever that you couldn't be fair and impartial should you be selected to serve as a juror in this case?

(No audible response.)

THE COURT: Now, counsel, that basically concludes my voir dire, but before I declare the panel free from exception, I'll hear you at side bar.

Counsel for the plaintiffs, are you satisfied?

The defendant, are you satisfied?

I declare the panel free from exception. Call the first eight jurors.

MR. HALL: Well, I wanted to say something.

THE COURT: Well, in the future, stay loose in the starting block.

Do you want to see me at side bar conference?

MR. HALL: Yes, sir.

APPENDIX G

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, ELKINS DIVISION

Case No. 2:00-CV-93

[Filed December 8, 2003]

DAVID BRYTE, Personal Representative of the Estate of Lova E. Bryte, Deceased, et al.,	)
Plaintiffs,	)
v.	)
SUNBEAM CORPORATION,	)
Defendant.	)

RECORD OF PROCEEDINGS
BEFORE RICHARD L. WILLIAMS, JUDGE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA
(and Jury)

* * *

[p. 211]

(Side bar concluded.)

MR. HANSEN: Your Honor, at this time we would read into the record about six or seven depositions from Sunbeam personnel about potential defects in the product.

MR. MOFFETT: We would object to that, Your Honor.

THE COURT: Do they relate to this particular case?

MR. HANSEN: Well, that would be where we would probably be disagreeing, Your Honor.

THE COURT: Well, have any of them examined this particular blanket?

MR. HANSEN: No, none of them are fact specific to this fire.

THE COURT: I'll provisionally deny your request but I will let you put it in the record.

MR. HANSEN: And we have done that as of last Friday, and we would make an offer of proof of all such deposition summaries, Your Honor.

THE COURT: Right. They will be received into evidence but not published to the jury.

MR. HANSEN: And we would also offer the underlying transcripts for the summaries as well.

THE COURT: And they will be admitted into evidence.

[p. 212]

MR. MOFFETT: To that end, Your Honor, I would offer our objections to any page and line of those transcripts that –

THE COURT: Based upon your previous objection?

MR. MOFFETT: Yes, sir.

THE COURT: All right.

MR. McLAUGHLIN: Your Honor, we were at the point where we discussed at the side bar making offers of proof.

THE COURT: Yes. But, otherwise, you have no other live witnesses?

MR. HANSEN: We would be resting other than the various offers of proof that we would be talking about.

THE COURT: All right. Ladies and gentlemen, suppose you take another short recess while I take some matters up with counsel.

Everyone remain seated while the jury departs.

(Jury exited the courtroom, at which time the following proceeds transpired:)

THE COURT: Okay. Do you want to make your proffer now or do it later or when?

If you have reports and that sort of thing that will flush that out, that will be adequate.

MR. HANSEN: Your Honor, I think that we have [p. 213] previously discussed at the side bar the extensive basis in which we disagree with the court's ruling concerning both the law of circumstantial evidence in the State of West Virginia as well as the requirements for circumstantial evidence in the Daubert requirements which have been a matter of much dispute previously which have been ruled on by Magistrate Judge Kaull and you are now apparently reversing to some extent those rulings.

We believe that the evidence would be absolutely sufficient if we put on testimony that this blanket malfunctioned. There is no question the blanket caught fire. We are certainly at that stage in the case.

We have eliminated improper use with the lay testimony.

We have eliminated other likely causes of the fire through the testimony which Mack Dennis I believe did for us, and at this point in time then we have to discuss the malfunctions and defects that occurred in this blanket to establish the circumstantial case.

You are denying that evidence based on a Daubert analysis and Daubert, we will argue, of course, but Daubert was intended to liberalize the rules, not restrict them. You are saying that because the blanket is not available and present for testing, that we cannot put on a prima facie case, and there is no law that says that, Your Honor.

[p. 214]

The cases all over the country on circumstantial evidence are that often times in catastrophic fires such as this the product is destroyed and you must then rely upon circumstantial evidence.

Now, let me show you and make the offer of proof that we would be prepared to make.

First off, we would be prepared to show that all of these blankets are the same -- the blankets and the throws are identical since 1990.

We will show that they have a fire risk because they do not pass UL standards.

We will show that they caught fire during quality assurance testing.

We will show that Sunbeam has acknowledged on Exhibit 2-C a whole bevy of different kinds of defects, possible causes, that can cause these fires. They have acknowledged that. We want to put that evidence in front of the jury by the way of Mr. Prins and other people who are employed by Sunbeam.

We want to tell the jury that the safety circuit is intended to protect against all of these problems and actually --

THE COURT: But, counsel, I have ruled on it and I am now giving you an opportunity to proffer what you [p. 215] want to flush out in the record, but I have heard argument on it and I have ruled on it and I don't intend to revisit it now.

MR. HANSEN: Thank you, Your Honor.

THE COURT: Okay. Are you prepared to rest so I can deal with a motion as a matter of law or do you have other witnesses that you want to put on?

MR. HANSEN: Our offer of proof is that Dr. Cronenwett would have said that this blanket was defective, it did malfunction, all other causes would have been eliminated, that there was no improper use, that there is a well known defect in this blanket to cause it to malfunction from his review of many, many other substantially similar cases.

He does have an opinion that that defect is the defect that caused this particular fire.

We would intend to have rendered those opinions on the witness stand consistent with that which we have set forth in the responses to our motions for summary judgment which again are matters of record before the court.

THE COURT: All right.

MR. HANSEN: And, again, we have substantial evidence of defects in these blankets that are before the court in the depositions and the numerous notebooks of [p. 216] exhibits, all of which we would tender as offers of proof in this case.

THE COURT: All of them are received into evidence so that the record will be complete subject to the objections, of course, but I'm letting them all in provisionally so that we will have a complete record in the case.

MR. HANSEN: And that would include all of the Sunbeam people, including their engineers.

THE COURT: Right.

MR. HANSEN: And former engineers who say this blanket has problems that cause it to catch fire, including Dr. Rowe, Mr. Prins, Mr. Murin, Mr. Garcia. All of these Sunbeam engineers and former engineers would say this blanket can catch fire through defects.

THE COURT: All right.

MR. HANSEN: And I think that with the crippled state of the record, we would then have to rest at this time based on what you have done.

THE COURT: All right.

MR. McLAUGHLIN: Your Honor, the other witnesses I was responsible for that were subpoenaed and were prepared to testify were Mr. Fisher, who we just addressed, a Brenda Perdue who was subpoenaed is here, Julie Harrah who was. . .